

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

Petition for Declaratory Ruling and	:	
Alternative Petition for Preemption of	:	WC Docket No. 10-60
the Pennsylvania, New Hampshire	:	
and Maryland State Commissions	:	

To: The Commission

COMMENTS

On March 5, 2010, Global NAPs, Inc., Global NAPs Pennsylvania, Inc., Global NAPs South, Inc. and other Global NAPs affiliates (“Global NAPs”) filed a Petition seeking a declaratory rulings ostensibly “to guide state commissions and federal courts in resolving actual controversies between Global and several local exchange carriers (‘LECs’) regarding the tariff treatment of Voice over Internet Protocol (‘VoIP’) traffic terminated to end users of interconnected LECs through Global.”

Global NAPs claims to seek “clarification” that would:

- (1) Preempt state commissions, such as the Pennsylvania Public Utility Commission (“PAPUC”), from finding that interexchange traffic, between two Pennsylvania telephone numbers, is subject to intrastate tariffs on the unproven (and untrue) theory that the traffic originates in IP protocol;
- (2) Preclude the application of intrastate access tariffs “once a carrier's traffic has been determined to be primarily nomadic VoIP” (a factual premise found to be untrue by the PAPUC);
- (3) Declare that the Local Exchange Routing Guides (LERGs), the bed rock of intercarrier compensation, is no longer a “reliable” basis for rating and billing traffic; and
- (4) Reverse prior Commission rulings and find that “connecting carriers” alleged to be forwarding IP-originated traffic are immune from access charges.

Alternatively, Global requests an order preempting actions by state commissions in Pennsylvania, New Hampshire, and Maryland.

Interested parties are invited to file comments on the Global Petition on or before April 2, 2010. These Comments are filed by the Pennsylvania Telephone Association (“PTA”)¹ in response.

I. SUMMARY

Any argument that Pennsylvania’s traditional jurisdiction over intrastate calls has been implicitly preempted by this Commission cannot be sustained. As the United States Supreme Court has explained, it will not be presumed that a federal statute or rule was intended to supersede the exercise of the power of the state *unless there is a clear manifestation of intention to do so*. Various courts and state commissions have already determined that the application of state access charges to nomadic VoIP has not been decided by this Commission and that current compensation regimes continue.

Global NAPs is simply seeking to avoid, by preemption, a valid and legal ruling recently adopted by the unanimous vote of the Pennsylvania Public Utility Commission acting in its traditional role on a matter involving intrastate commerce.

The thrust of Global NAPs’ Petition is the sweeping presumption that the Commission’s *Vonage Decision* preempted compensation for calls between Pennsylvania telephone numbers and the jurisdiction of the PA PUC over in-state toll calls to the extent that Global NAPs could demonstrate that the call originated in IP format. To the contrary, this Commission has never ruled that intrastate access charges may not be applied to nomadic VoIP traffic. In the *Vonage*

¹ The PTA is the Commonwealth’s oldest trade organization for the local exchange carrier industry. PTA represents more than 30 rural telecommunications companies that provide a full array of services over wireline networks. PTA members support the concept of universal service and are leaders in the deployment of advanced telecommunications capabilities.

Decision, the Commission only addressed state jurisdiction over public utility regulation of Vonage's service and expressly stated that it rendered no ruling on the question of compensation for nomadic VoIP calls. Other types of IP-originated calling, such as cable voice services, were not addressed at all.

Finally, customer location is not used as a point of billing reference, including the CLECs serving the same nomadic VoIP providers whose traffic Global NAPs claims (but has not demonstrated) is in the stream that it delivers to the PSTN. The rate center of the assigned number is the foundation of all billing systems and is used by all participants in the industry, including ILECs, CLECs, wireless carriers, cable companies and even the CLECs serving Vonage.

Global NAPs' Petition ignores or misconstrues the Commission's rulings in *Time Warner*, *AT&T Calling Card*, *IP-Enabled Services*, *Unified Inter-carrier Compensation*, and *Prepaid Calling Card Services Orders*, which expressly endorse the continued use of traditional concepts of intrastate and interstate inter-carrier compensation for both VoIP and enhanced traffic.

In short, by drawing unwarranted distinctions among technologies, Global NAPs would transform the entire inter-carrier billing systems into something that is unworkable and financially catastrophic. Hundreds of millions of long distance voice minutes are received and billed solely on the basis of the originating and terminating numbers (which information is contained within the calling records) and has operated for decades as the basis for all inter-carrier billing. Introduction of variables that are unknown to the terminating carrier, such as originating technology or the physical location of the calling party, makes billing impossible. That is why

such considerations have never been incorporated into either federal/state tariffs or regulatory law.

II. GLOBAL NAPS' OPERATIONS AND THE PAPUC ORDER

A. Factual Background

Prior determinations by this Commission of the appropriate regulatory classification of a service have been based upon factual finding regarding the nature of the service and the carrier's operations. Particularly given the lack of factual description in the Petition, a short description may be helpful to the Commission. This Commission has the benefit of an extensive, litigated record developed before the PAPUC, a record that Global NAPs has characterized as the most extensive developed on its operations anywhere.²

The complainant, Palmerton Telephone Company, is a small, rural ILEC near the Pocono Mountains that Global NAPs denied payment for almost \$300,000 in terminating access services it received from Palmerton.

Global NAPs has no direct connection to Palmerton, and had never requested one. Global NAPs obtained an interconnection arrangement with Verizon by virtue of its CLEC status in Pennsylvania (Palmerton Exh. 7) and then uses the "Joint Billing Agreement" between Palmerton and Verizon (Palmerton Exh. 3) to obtain indirect delivery to Palmerton. Global NAPs has never applied for access interconnection or submitted a § 252 request for interconnection.³

² *Palmerton Telephone Company v. Global NAPs South, Inc., Global NAPs Pennsylvania, Inc., Global NAPs, Inc. and Other Affiliates*, PAPUC Docket C-2009-2093336, Opinion and Order entered March 16, 2010 ("PA Global NAPs Order"). The PTA's Comments recites the facts as litigated on the record in Pennsylvania (with original citations to the Pennsylvania record).

³ Global NAPs only submitted a request for interconnection after the PAPUC adopted its Order.

The Pennsylvania record showed that Global NAPS never originates any traffic. It accepts a call in mid-path from another carrier that does not generate the call either and then performs final delivery to the destination local exchange company (“LEC”). Global NAPS makes no claim of enhancing the call in any way. Tr. 876. It offers no specialized services. “[W]e don’t profess ourselves to be an enhanced service provider” or an information service provider. Tr. 876.

Global NAPs’ sole function on a call is as the final link in the long distance chain to the terminating LEC. “We look up where [the call] needs to go and send it out the appropriate trunk.” Tr. 877. It has provided this “local termination service” (its label for this service) to numerous entities. Tr. 809-810. It cannot identify the originating protocol of the traffic, as its network is basically “dumb.” It is a simple pipe for delivery.

To test Global NAPs’ claim that all of its traffic originates as “nomadic” VoIP, the same assertion now made to this Commission, Palmerton undertook a traffic study of some 2000 of the calls delivered. The study revealed numerous types of originating technologies, including TDM, wireless and cable VoIP (Palmerton Exh. 7 and 8):

- 1,150 Cable voice (fixed VOIP) calls (56%)
- 362 Incumbent Local Exchange Carrier (TDM) calls (17%)
- 470 Competitive Local Exchange Carrier, certificated by PA PUC as providing “telecommunications services,” calls (23%)
- 82 Inter MTA Wireless calls (4%)

The parties used the study to interview numerous carriers and present testimony. Within the studied traffic stream, It could only identify 19 calls as originating with a nomadic VoIP service provider.

It is entirely common for several long distance carriers to participate in the delivery chain of a long distance call, no matter the protocol. Tr. 595-596, 734-735. Originating companies

regularly hand the call off to another carrier, particularly if pricing is cheaper. Tr. 586-587, 618, 630, 741, Palmerton Exh. 12, pp. 22-23. Carriers route traffic among themselves on the basis of where their facilities are located (i.e., can the call get to its destination?) under a “least cost standard” (i.e., what is the cheapest way to deliver the traffic?). Global NAPs’ competitors in this delivery service business include MCI, AT&T, Sprint, Global Crossing, Wiltel and Worldcom. Tr. 57.

Least cost routing among long distance carriers is computerized and performed in real time. As Palmerton’s witness explained, a call will be received “at which point the IXC switch knows that this call [is] heading to the Philadelphia LATA at 10:30 in the morning. My best rate is if I hand this off to Global Crossing. Global Crossing then completes it... Global Crossing might hand it off to somebody else who thinks they can do it for a penny a minute. Now Global Crossing just made a penny doing least-cost routing.” Tr. 741-742.

The practice of call hand-off on a least cost routing basis is wide spread. Comcast, for example, doesn’t deliver its long distance traffic to any particular carrier. “We use what’s commonly referred to as a least cost routing model. We have agreements with a number of inter-exchange carriers and the model is built so that it picks up the most cost efficient means of transporting that call at the given time of day.” Palmerton Exh. 12, p. 22.

The consequences of access cheating in a competitive market are clear. The evasion of Palmerton’s state access charges by Global NAPs created an “uber-least-cost router” and an unfair competitive advantage based upon a simple assertion of non-payment. Tr. 743.

B. Pennsylvania Commission Order

After reviewing the extensive litigation record developed by Palmerton and Global NAPs, the PAPUC made the following factual findings:

- **Palmerton Can Not Refuse to Accept Traffic Delivered to It.** “GNAPs’ traffic termination at Palmerton’s facilities is indirect ... and Palmerton was clearly obligated to terminate the traffic and did so until on or about May 19, 2009 when GNAPs ceased sending traffic to Palmerton.” *PA Global NAPs Order* at 34.
- **Global NAPs Sends All Types of Traffic That Originate From Many Carriers.** “GNAPs is engaged in the provision of common carrier telecommunications service in transporting VoIP and other types of traffic calls that are not IP-based, e.g., conventional wireline voice call traffic transmitted under time division multiplexing or TDM, wireless calls, asynchronous transfer mode or ATM traffic, etc.” *PA Global NAPs Order* at 9; See also *Id.* at 31.
- **Global NAPs Has No Idea What Traffic It Is Sending.** “GNAPs is unable to explain the presence of more conventional intrastate interexchange ILEC, CLEC, and wireless calls in the stream of traffic that it transports and indirectly terminates at Palmerton’s PSTN facilities ... and GNAPs’ own testimony does not totally exclude their presence. Tr. 925-928.” *PA Global NAPs Order* at 33.
- **Global NAPs Does Not “Enhance” the Traffic.** “GNAPs acknowledges that it is not an “enhanced service” or “information service provider” (ISP), and that it does not itself engage in any alleged “enhancement” of the traffic that it transports. Tr. 876-877.” *PA Global NAPs Order* at 32.
- **The Calls That The PAPUC Found Jurisdictional Are Intrastate, Between PA Numbers.** “.... the NPA/NXX origin and termination of the call are clearly intrastate on the basis of available billing information, associated technologies, and established industry practices for the purposes of establishing the appropriate level of intercarrier compensation. *PA Global NAPs Order* at 42. I
- **The LERG Is the Industry Standard For Billing.** “Under currently established practices and available technologies dealing with the rating and billing of interexchange calls, Palmerton largely relies on the originating number of the call and other billing and data base information (e.g., rate centers, Telcordia terminal point master data base, local exchange routing guide or LERG, billing information received from the Verizon PA tandem switch, Signaling System 7 or SS7) to determine whether the call is intrastate or interstate. Tr. 512-513, 739.” *PA Global NAPs Order* at 38.

- **Customer Location Is Unknown and An Impractical Basis for Billing.** “The existing state of carrier access billing system technologies and industry practices do not yet permit such a precise location identification of a calling party; neither was Palmerton aware of any network signaling system that would permit such a precise identification. Tr. 579.” *PA Global NAPs Order* at 40.
- **The Terminating Carrier Would Have No Idea of the Originating Protocol, Absent a Special Study.** “Furthermore, the evidentiary record indicates that since VoIP or IP-enabled calls are transformed into the TDM protocol prior to their final termination in Palmerton’s PSTN facilities (Verizon PA’s tandem switch on Market St., Philadelphia, Pa., will forward the traffic to Palmerton in TDM protocol), Palmerton cannot technologically determine whether such calls originated in IP format in the first place. Tr. 382, 849-850, GNAPs Exh. 6 (routing of Vonage nomadic VoIP traffic).” *PA Global NAPs Order* at 40.
- **Global NAPs Refused to Pay Anything.** “The evidentiary record is clear that GNAPs has not paid *any* access charges to Palmerton, whether interstate or intrastate, and that Palmerton’s monetary claim is concentrated on the intrastate portion of the intercarrier compensation dispute at issue that is clearly within this Commission’s jurisdiction. Tr. 284, 287.” *PA Global NAPs Order* at 32.

Derived from these and other found facts, the PAPUC’s legal conclusions dealt only with compensation for calls between Pennsylvania telephone numbers. There was no jurisdiction asserted over VoIP providers (either nomadic or fixed). The PAPUC simply found that it had jurisdiction over compensation for “interconnected VoIP” where PA-registered numbers were involved:

- **No Jurisdiction Was Asserted By The PAPUC Over Nomadic VoIP.** “Here, as in many other jurisdictions, we are not dealing with the issue of market entry and regulation of nomadic VoIP service providers.” *PA Global NAPs Order* at 25.
- **The PAPUC Ruling Was Limited to Compensation for the Telecommunications Functionalities Provided By Global NAPs.** “Instead, we are dealing with GNAPs’ *wholesale transport (inclusive of VoIP or IP-enabled calls), access to and termination of*

traffic in Palmerton's PSTN network facilities, and these are clearly telecommunications functions and services under the Commission's jurisdiction in accordance with applicable Pennsylvania and federal law." *PA Global NAPs Order* at 27-28.

- **Global NAPs Is a Common Carrier Operating Under A PA CLEC Certificate.** "GNAPs' function of transmitting and then indirectly accessing and terminating traffic at Palmerton's network facilities is a common carrier telecommunications service." *PA Global NAPs Order* at 8. "...we are dealing with the issue of GNAPs, a telecommunications utility carrier, which transports and terminates traffic at Palmerton's PSTN facilities." *PA Global NAPs Order* at 25.
- **PAPUC Precedent Is Consistent with This Commission's Time Warner Ruling – the Underlying Technology of a Call Delivered By a Telecommunications Carrier Does Not Matter.** "Our *Sprint* Order noted with approval Sprint's position that the "mere fact that Sprint uses Internet Protocol – a particular technology adopted by most of the cable industry for placing voice traffic onto a hybrid fiber coax network – does not render Sprint's service an internet service." *PA Global NAPs Order* at 11.
- **No Commission Preemption Over Intercarrier Compensation Has Occurred.** "This Commission is not preempted by the FCC in addressing the intercarrier compensation issues at hand. Furthermore, GNAPs' contention that the FCC somehow "has clearly and repeatedly stated its intention" to preempt state regulatory jurisdiction over intercarrier compensation matters for "all VoIP and enhanced traffic" is without basis in law or fact. That assertion flies in the face of federal appellate and district court decisions that have addressed intercarrier compensation disputes involving GNAPs itself." *PA Global NAPs Order* at 26-27.
- **The Commission's Failure to Act Is Not Preemption.** "Similarly, the fact that the FCC has not yet made definitive pronouncements in its long pending but still unresolved proceedings relating to intercarrier compensation and the proper classification of IP-based services, including VoIP, did not detract from the adjudication of intercarrier compensation disputes involving GNAPs by a majority of state utility regulatory commissions and courts of proper jurisdiction." *PA Global NAPs Order* at 14.
- **The States May Act In the Absence of Express Preemption, and, Indeed, Is Compelled to Act Under Federal and State Law.** "This Commission has also

adjudicated a number of intercarrier compensation disputes under the premises of applicable Pennsylvania and federal law whether such cases involved the interpretation and enforcement of intrastate carrier access tariffs and/or interconnection agreements. In a similar vein, we do not need and cannot afford to wait and speculate whether the FCC will reach some sort of coherent and sustainable conclusion to its IP-enabled services and intercarrier compensation reform proceedings, when this might happen, and what the FCC's conclusions might be." *PA Global NAPs Order* at 26.

These are the factual finding and legal rulings by a state commission acting solely within the realm of intrastate toll traffic to curb abusive and predatory behavior by a notorious arbitrager. This Commission has not, should not, and indeed, cannot preempt such a ruling.

III. THE COMMISSION SHOULD ADDRESS GLOBAL NAPs' PETITION AND DENY THE RELIEF SOUGHT

A. The Commission Previously Found That Traffic Delivered to the PSTN by a Telecommunications Carrier Is Subject to Access Charges Regardless of Originating Format

While it is true that state regulation of nomadic VoIP service providers has been preempted from state regulation,⁴ the question of state regulation over end user services is distinctly different from whether intercarrier compensation is due for terminating such traffic. In the *Vonage Decision*,⁵ this Commission granted Vonage's petition to preempt the order of the Minnesota PUC, which sought to regulate Vonage as a state public utility. The Commission found the service to be "jurisdictionally mixed" which could not be separated into intrastate and interstate components.⁶ The Commission determined that Minnesota's regulation of Vonage as a

⁴ I.D. at 29 (citing various Commission and appellate decisions relating to Vonage Holding Corp.).

⁵ *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, WC Docket No. 03-211, FCC 04-267, released November 12, 2004, at ¶ 3 ("*Vonage Decision*").

⁶ *Id.* at ¶ 19.

public utility “would thwart federal [policy] objectives.”⁷ Given this locational ambiguity, the Commission declared nomadic VoIP carriers could be regulated only by the Federal government.

The *Vonage Decision* expressly eschewed any implication that it was also ruling on either access compensation or separation of toll traffic between state and interstate:

...we anticipate addressing other critical issues such as universal service, intercarrier compensation, section 251 rights and obligations, numbering, disability access, and consumer protection in [the *IP-Enabled Services Proceeding*].⁸

Indeed, Commissioner Adelstein was openly critical of the failure to address compensation issues:

Where this Order falls short is its failure to account in a meaningful way for essential policy issues, including universal service, public safety, law enforcement, consumer privacy, disabilities access, and intercarrier compensation, and the effect of our preemption here.⁹

Instead, the Commission deferred the issue of nomadic VoIP compensation to two different dockets, one expressly involving VoIP¹⁰ and in another regarding generic access charge reform,¹¹ neither of which has yielded any ruling at the present time. Notably, within its own jurisdiction, the Commission has not exempted IP traffic from interstate access charges. It has changed no regulations¹² and no federal tariffs have been revised.

Global NAPs makes no claim to being an enhanced service provider and concedes that its function is purely one of the final transmission to the PSTN. The fact that the content may be enhanced by someone else does not change the clearly telecommunication nature of the delivery service provided by Global NAPs. The notion that carriers hauling interconnected VoIP

⁷ *Id.* at ¶ 14.

⁸ *Id.* at ¶ 44.

⁹ *Id.*, Concurring Statement of Commissioner Jonathan Adelstein.

¹⁰ See *IP-Enabled Investigation*.

¹¹ See *Unified Intercarrier Compensation NOPR*.

¹² The Commission’s regulations at § 69.5(b) provides that access charges are applicable to all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign services. 47 C.F.R. § 69.5(b).

originated traffic (both nomadic and fixed) are telecommunication carriers was set forth in the

VoIP Universal Service Decision:

“Over the top” interconnected VoIP providers generally purchase access to the PSTN from a telecommunications carrier who accepts outgoing traffic from and delivers incoming traffic to the interconnected VoIP provider’s media gateway. ... The telecommunications carriers involved in originating or terminating a communication via the PSTN are by definition offering “telecommunications.”¹³

Exactly on point, in the case involving Time Warner, the cable (VoIP) service provider, and its desire to obtain PSTN connectivity through MCI and Sprint,¹⁴ the Commission ruled that:

...we confirm that providers of wholesale telecommunications services enjoy the same rights as any “telecommunications carrier” under those provisions of the Act. We further conclude that the statutory classification of the end-user service, and the classification of VoIP specifically, is not dispositive of the wholesale carrier’s rights under section 251... The Act defines “telecommunications” to mean “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” The Act defines “telecommunications service” to mean “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” Finally, any provider of telecommunications services is a “telecommunications carrier” by definition under the Act.¹⁵

It made no difference to the Commission that the traffic delivered originated in Internet protocol.

The carrier delivering such calls is a telecommunication carrier. This ruling followed *Vonage* by three years.

¹³ *In re Universal Service Contribution Methodology, et al.*, WC Docket No. 06-122 *et al.*, (FCC June 27, 2006), Report and Order and Notice of Proposed Rulemaking, FCC 06-94 at ¶ 41 (“*VoIP Universal Service Decision*”).

¹⁴ “TWC purchases wholesale telecommunications services from certain telecommunications carriers, including MCI WorldCom Network Services Inc. (MCI) and Sprint Communications Company, L.P. (Sprint), to connect TWC’s VoIP service customers with the public switched telephone network (PSTN). MCI and Sprint provide transport for the origination and termination on the PSTN through their interconnection agreements with incumbent LECs.” *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55 (Memorandum Opinion and Order, released March 1, 2007) at ¶ 2 (“*Time Warner Decision*”).

¹⁵ *Time Warner Decision* at ¶ 9-10.

Nor does the content of the call render it immune from access charges. As the Commission further ruled in *Time Warner*, payments are due regardless of the originating technology:

In the particular wholesale/retail provider relationship described by Time Warner in the instant petition, the **wholesale telecommunications carriers have assumed responsibility for compensating the incumbent LEC for the termination of traffic** under a section 251 arrangement between those two parties. **We make such an arrangement an explicit condition** to the section 251 rights provided herein. *See, e.g.*, Verizon Comments at 2 (stating that one of the wholesale services it provides to Time Warner Cable is “administration, payment, and collection of intercarrier compensation”); Sprint Nextel Comments at 5 (offering to provide for its wholesale customers “intercarrier compensation, **including exchange access and reciprocal compensation**”).¹⁶

Like these wholesale CLECs, Global NAPs obtained an interconnection agreement with Verizon (and delivery access to Palmerton) on the basis that it is a telecommunications carrier. Having gained these rights, it cannot now claim that the traffic is not telecommunications.

Also on point, a Federal District Court recently determined that compensation has not been revised for nomadic VoIP service, and that current compensation regimes must be followed by Global NAPs specifically:¹⁷

Obviously, the FCC had to be well aware of the existence of substantial VoIP traffic in the telecommunications marketplace otherwise it would not be pondering overall regulation. Equally obvious, the FCC had to be aware also that the existing VoIP traffic is moving at someone’s expense. The fact that neither on the complaint of Global nor in any other proceeding referred to us by the parties has the FCC deemed it necessary to intervene to upset compensation schemes involving such traffic agreed to by the carriers, [citing Vonage], leaves the inescapable conclusion that the FCC is in the interim deferring to the existing intercarrier agreements as controlling such billing issues and is left for courts or arbitration to resolve any contractual disputes about VoIP traffic arising out of them.¹⁸

¹⁶ *Time Warner Decision* at ¶ 17. (Emphasis added).

¹⁷ *Verizon New York Inc. v. Global NAPs, Inc.*, 463 F.Supp.2d 330, 342 (E.D.N.Y. 2006).

¹⁸ *Id.* at 342. The fact that tariffs are applicable in this case, and in other cases cited, the parties have entered into interconnection agreements is of no moment. The tariff is the agreement.

None of the carriers interviewed in the Pennsylvania case, including the VoIP carriers, believed that access charges did not apply to their traffic. Every single carrier that originated the traffic shown in Palmerton's traffic study that testified, affirmed that it both expected to receive and pay access charges for its traffic.

The **only** instance of numbers assigned to Vonage contained on the entire record in Pennsylvania involves Paetec (19/2000 calls studied), a carrier certificated to provide local and interexchange by the PAPUC. Where a number is assigned to Vonage by Paetec, the address of the Paetec number is listed in the LERG as a Paetec rate center (switch), so that when a Palmerton customer calls that Vonage-assigned telephone number, the call is routed to that Paetec switch. And Paetec charges terminating intrastate access charges to accept traffic to a number assigned to Vonage, even though the call continues on to go to Vonage's "nomadic" network.

Finally, the nomadic VoIP service provider, Vonage itself, also agrees that access rates are due to the recipient of its traffic. As Vonage stated in sworn SEC documents:

The incumbent phone companies own networks that include a "last mile" connection to substantially all of our existing and potential customers as well as the places our customers call. As a result, the vast majority of the calls placed by a Vonage customer are carried over the "last mile" by an incumbent phone company, and we indirectly pay access charges to these competitors for each of these calls.¹⁹

"On each call," unless, of course, the call is delivered by Global NAPs.

Global NAPs is not proposing that the PSTN-to-Vonage call not continue to pay terminating access, only that the Vonage-to-PSTN call, when delivered by Global NAPs, be exempt. This decidedly lopsided theory of compensation simply underscores the predatory nature of Global NAPs' operations.

¹⁹ Annual Report Pursuant to Section 13 or 15(d) of The Securities Exchange Act of 1934 (FORM 10-K) of Vonage Holdings Corp., SEC file number 001-32887 at 7-8 (emphasis added).

B. The Commission Has Never Preempted State Jurisdiction over Intrastate Access Compensation

The PAPUC has been actively engaged in the regulation and resolution of disputes involving intrastate access tariffs and arrangements since the divestiture of AT&T in 1984 and in intercarrier settlements for many decades before that.

The United States Supreme Court has held that: “Where ... the field that Congress is said to have pre-empted has been traditionally occupied by the States ‘we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’”²⁰

Absent clear and unambiguous preemption by the Commission or Congress, state law applies. To be effective, preemption must be clear. The “concepts of federalism and state sovereignty make clear that in discerning whether Congress intended to preempt state law, there is a presumption *against* preemption. Specifically, the Pennsylvania Supreme Court has stated that it will not be presumed that a federal statute was intended to supersede the exercise of the power of the state *unless there is a clear manifestation of intention to do so.*”²¹

There has been no such preemption by the FCC or any Federal Court of intrastate intercarrier compensation. In its *Unified Intercarrier Compensation NOPR*,²² the Commission expressly continued to recognize that the traditional classification of the calls among and within states continues:

The access charge rules can be further broken down into *interstate* access charge rules that are set by this Commission, and *intrastate* access charge rules that are set by state public utility commissions. Both the interstate and intrastate access charge rules establish charges that IXCs must pay to LECs....²³

²⁰ *Hillsborough County v. Automated Med. Labs, Inc.*, 471 U.S. 707, 715 (1985) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (citations omitted)).

²¹ *Dooner v. DiDonato*, 971 A.2d 1187, 1194 (Pa. 2009) (citations omitted)(emphasis added).

²² *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92 (Report and Order issued March 3, 2005) (“*Unified Intercarrier Compensation NOPR*”).

²³ *Id.* (¶ 7).

Just three months ago, the Commission acknowledged that it still has not changed the compensation rules for VoIP or preempted the application of access charges, either inter or intrastate.²⁴ Rather, the Commission ruled that disputes should be resolved by the states on the basis of “existing law.” This exactly what the PAPUC did.

C. Utilization of the LERG and NANPA Numbers Is Commercially Critical To Rating and Billing Toll Calls and Has Been Affirmed By the Commission Previously

The telephone number assigned to the end-use customer is used to both route and bill for long distance calls. Each telephone number (or block of numbers) is formally assigned by Neustar, the North American Numbering Plan Administrator (“NANPA”), to a registered rate center (the physical location of a switch) into which the number is “loaded.”

That rate center is then listed in the official industry routing guide published by Telcordia known as the Local Exchange Routing Guide (“LERG”).²⁵ All companies delivering and receiving traffic; irrespective of technology, obtain numbers and officially report a rate center address for each number in their possession.²⁶ They are the “code holder” for the number.

That officially listed rate center then becomes the network address for that number. All calls are routed on the basis of the telephone number rate center. Every call is routed and completed (i.e., the called phone rings) according to its listed rate center.

Where ported, the telephone number must remain within the same geographic area. The Telecommunications Act of 1996 (“TCA-96”) and Commission rules forbid “geographic porting.” In promulgating its number portability rules, the Commission has determined that the

²⁴ *Petition of UTEX Communications Corporation, Pursuant to Section 252(e)(5) of the Communications Act, for Preemption of the Jurisdiction of the Public Utility Commission of Texas Regarding Interconnection Disputes with AT&T Texas*, WC Docket No. 09-134, Memorandum Opinion And Order released October 9, 2009 at ¶¶ 9 and 10.

²⁵ The LERG is used for call routing. The Terminating Point Master (“TPM”) is the standard data base used by the industry, including Verizon and Palmerton for billing purposes. Both are published by Telcordia.

²⁶ If the number is ported, that would be reflected in Neustar’s number portability data base. Tr. 673-674.

TCA-96 requires *service provider portability but not geographic location portability*.²⁷ In other words, when a customer switches carriers, the telephone number must stay within the physical rate center of the number as originally issued. If the customer moves out of the assigned rate center, from Pennsylvania to Colorado, for example, the number cannot be ported. Tr. 568-569. These rules also apply to cellular traffic.²⁸ In November 2007, the Commission extended these rules to VoIP carriers as well.²⁹

Intercarrier billing is not and never has been based upon the customers' (calling and called) physical location. There is no information contained in a call that identifies the actual physical location of the caller. There is no known way to bill based upon where the calling customer is actually located. It is unknown and irrelevant, both under law and industry practice.

Access charges are due according to the called and calling numbers. The Pennsylvania RLECs federal and state access tariff mirror these industry and regulatory practices. The interstate portion, under the state tariff, is determined "where the calling number is in one state and the called number is in another state..."³⁰ Intrastate is the reciprocal.

These routing and billing rules have been affirmed numerous times by the Commission and not changed (and certainly not preempted), *including* as to numbers ported to a VoIP service provider.³¹ As recently as 2006, the Commission explained and endorsed the use of telephone number to determine intercarrier compensation:

²⁷ See *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 8352, 8447 (1996) ("Number Portability Decision").

²⁸ See *In the Matter of Telephone Number Portability CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues*, 18 FCC Rcd 23697 (2003) ("Intermodal Number Portability Order") at ¶ 22, *remanded*, *U.S. Telecom Ass'n v. FCC*, 400 F.3d 29 (D.C. Cir. 2005) (finding that the Intermodal Number Portability Order was a legislative rule, remanding the order to prepare a FRFA, and staying future enforcement of the order against small entities until the Commission published a FRFA).

²⁹ See *In the Matter of Telephone Number Requirements for IP-Enabled Services Provider Local Number Portability Porting Interval and Validation Requirements IP-Enabled Services Telephone Number Portability Final Regulatory Flexibility Analysis Numbering Resource Optimization*, 23 FCCR 1647 (2007) ("VoIP Porting Decision").

³⁰ *Id.*

³¹ *Intermodal Number Portability Order*, at 17 (¶ 40); *VoIP Porting Decision*, at pages 75-76.

In a standard interexchange call, the [calling party number] will be passed as part of the SS7 signaling message, and **the carriers involved in the call should be able to determine the jurisdiction based on a comparison of the calling and called party telephone numbers.** 47 C.F.R. § 64.1601. As noted in the *Intercarrier Compensation FNPRM*, the emergence of wireless and IP-based calling options makes it less likely that a comparison of telephone numbers will provide meaningful information on the geographic end points of call. Nevertheless, **for now carriers continue to rely on telephone numbers as a proxy for geographic locations.** See *Intercarrier Compensation FNPRM*, 20 FCC Rcd at 4696-97, paras. 20-22.³²

This recognition of routing and billing realities is not new. The Commission had previously ordered that compensation continue to be based on the telephone number in 2002³³ and again in 2003.³⁴

CLECs serving nomadic VoIP providers use this same method to receive and bill for incoming calls. Where a number is assigned, Vonage is the customer. The number is still listed in the LERG as the CLEC's rate center, so that when a PSTN customer calls that Vonage-assigned telephone number, the call is routed to Paetec's switch. Paetec then charges inter or intrastate tariffed access based upon the Telcordia registered location despite the fact that the call may continue on to Vonage.

Every originating carrier interviewed in the Pennsylvania case, including interconnected VoIP carriers, categorically agreed that access charges apply to their traffic, whether they were sending or receiving traffic. Palmerton Telephone categorically stated that every one of the

³² *Regulation of Prepaid Calling Card Services*, WC Docket No. 05-68, Declaratory Ruling and Report and Order, FCC 06-79, released June 30, 2006 at ¶ 32 and FN 89 ("*Regulation of Prepaid Calling Card Services*") (emphasis added).

³³ *In the Matter of Petition of WorldCom, Inc. et al Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, CC Docket Nos. 00-218, 00-249 and 00-251, Memorandum Opinion And Order, released July 17, 2002 at ¶¶ 286 and 301 ("The parties all agree that rating calls by their geographical starting and ending points raises billing and technical issues that have no concrete, workable solutions at this time.").

³⁴ *Starpower Communications, LLC v. Verizon South Inc.*, File No. EB-00-MD-19 (Memorandum Opinion and Order released November 7, 2003) at ¶¶ 16 - 17 (intercarrier compensation to be on the basis of the telephone number NPA-NXX).

originating companies listed on Palmerton's traffic study pay access charges when they deliver traffic directly, rather than through Global Naps.

D. Connecting Carriers of VoIP Traffic Are Telecommunications Carriers and Subject To Access Charges

Next, Global NAPs creates a novel regulatory category it labels "intermediate carrier," and then claims exemption from the payment of access charges on the basis of semantics. Global NAPs creates the term from whole cloth and attempts to confer it with regulatory meaning as an alternative to the established terminology of "interexchange carrier," which actually does describe Global NAPs' operations.³⁵ Global NAPs' newly claimed status as an "intermediate carrier" is really a renunciation of its regulatory obligations as a CLEC and IXC.

The Commission rule cited by Global NAPs, which authorizes the assessment of access charges "upon all interexchange carriers that use local exchange switching facilities for provision of interstate or foreign telecommunications services,"³⁶ is fully descriptive of Global NAPs' delivery of traffic to Palmerton.

Global NAPs' recitation of a portion of the Commission's ruling in AT&T's "IP-in-the-middle" case is both inaccurate and inapplicable to Global NAPs' operations. In that case, conversion to Internet protocol was a function sandwiched between the origination and termination of the call -- a step in the middle.³⁷ The Commission found that AT&T, since it presented traffic to local exchange carriers for termination was subject, therefore, to access and other interconnection charges. So, indeed, the case stands for the opposite proposition for which

³⁵ Global NAPs relies upon the dictionary and not any regulatory precedent to define the term.

³⁶ 47 CFR § 69.5(b).

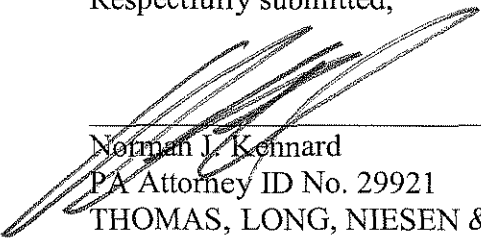
³⁷ AT&T's service began and ended on the public switched network in traditional network protocol, time division multiple ("TDM") protocol. The call was accepted by AT&T from the LEC, converted to Internet protocol ("IP") transported, and then reconverted back to TDM for delivery to the terminating LEC. Hence, it was "IP in the middle" of the AT&T network. This was the "intermediate" function to which the Commission was referring. *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, WC Docket No. 02-361, FCC 04-97, released April 21, 2004.

Global NAPs cites it.³⁸ Nor is Global NAPs in the middle (i.e., “intermediate”) of the calls sent to Palmerton. It is the delivering carrier whose service specifically provides the final link in the long distance chain to the terminating LEC.

IV. CONCLUSION

Global NAPs’ Petition should be denied. Rather than preempting the states, the Commission should order Global NAPs to pay the interstate portion of the traffic it delivers to Palmerton and for which Palmerton remains unpaid, as well.

Respectfully submitted,



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³⁸ Global NAPs cites to a footnote, and fails to cite the main text to which the footnote is attached. There, the Commission declined to make any ruling:

We do not make a determination at this time regarding the appropriateness of the retroactive application of this declaratory ruling against AT&T or any other party alleged to owe access charges for past periods

Id. at ¶ 23. Thus, there was no ruling by the Commission in the *AT&T* decision, merely *dicta*.